United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-1847

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH NOVOA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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2

INDEX TO BRIEF

INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT'D)

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BRIEF FOR APPELLANT
JOSEPH NOVOA

PRELIMINARY STATEMENT

The appellant, JOSEPH NOVOA, appeals from a judgment, United States District Court, Southern District of New York, (Judge Inzer Wyatt), adjudging the appellant guilty of the following: (a) conspiracy under 18 U.S.C. 371 to violate Sections 3 and 1510 of 18 U.S.C. under count 1 of the indictment; (b) conspiring to violate 21 U.S.C. 173 and 174 (since repealed) under count 4 of the indictment; (c) violating 21 U.S.C. 173 and 174 (since repealed) under counts 5 through 10 of the indictment.

As a consequence of being found guilty by the jury and as a consequence of the convictions, the appellant was sentenced as follows: on count 1 of the indictment the appellant was sentenced to a five (5) year jail term to be served concurrently with ten (10) year concurrent jail terms imposed under counts 4 through 10 of the indictment.

The appellant is not on bail pending this appeal an application therefor having been made and heard by this Court August 13, 1974, said application being denied.

THE ISSUES AND QUESTIONS INVOLVED:

A. Was the appellant's right to a fair trial prejudiced by the allowance of proof of prior acts attributed to the appellant, such acts not being charged in the indictment?

B. Was the Court below in error where it instructed the jury that the jury could consider testimony that narcotics being wrapped in a Spanish newspaper may have been imported by virtue of being so wrapped?

C. Was there sufficient proof that the appellant conspired to defraud the United States by violating Sections 3 and 1510 of 18 U.S.C. in that there was no proof that the appellant knew that the laws of the United States were involved and there was no proof that the appellant intended to violate such laws or alternatively, was their insufficient proof to show a "federal intent" on the part of the appellant in regard to the first count of the indictment charging conspiracy as aforesaid?

D. Should a pre-trial motion to sever the appellant's case from the other defendants as well as a renewal of that motion made during trial, have been granted where the appellant who testified was restrained from testifying that he arrested a co-defendant on trial with him, named Nieves,

for a narcotic violation?

E. Should the Court have given an "Allen" charge to the jury where the jury reported a deadlock?

STATEMENT OF FACTS

THE GOVERNMENT'S CASE AGAINST THE APPELLANT

The appellant is a former New York City police officer. A co-defendant named Daly, was also a former New York City police officer but he was not tried with the appellant because Daly left the country.

The principal witnesses for the government was one Salvatore Boutureira, a brother-in-law of a former New York City police officer named Carl Aguiluz who also testified for the government. Other witnesses who were members of the New York City police force or former members testified as to alleged prior offenses, the commission of which were attributed to the appellant. These offenses were uncharged.

Boutureira testified that he knew the appellant through his brother-in-law Carl Aguiluz and that Aguiluz and the appellant were New York City police officers who worked together (40a). He also knew the other co-defendant Daly having met him through his brother-in-law and consequently knew that he was also a police officer at all the relevant times, (41a).

Boutureira also made in-court identifications of the other defendants including a co-defendant named Nieves (41a).

Boutureira related that in April 1970 he was visited by his brother-in-law, Aguiluz, who gave him a bag telling him to put it away (42a, 43a). Boutureira later examined the contents of the bag and found that it contained five (5) cellophane bags filled with a white powder (43a). Boutureira was later told by his brother-in-law, Aguiluz, that the contents consisted of three (3) kilos of heroin and two (2) kilos of cocaine (44a-47a). This witness next fixed the date of this meeting as either February, March, April or May, 1970 (45a, 46a).

The witnesses' brother-in-law Aguiluz enlisted him to dispose of the narcotics (48a). Ultimately Boutureira arranged with one Ramos to dispose of the drugs (48a, 49a).

Boutureira related that he discussed with his brother-in-law the price of the heroin and the cocaine fixing a price of $12,000 for the heroin and $9,500 for the cocaine (49a, 50a). Ultimately, through Ramos, a sale was effected (67a). The appellant, Daly and Aguiluz were in the nearby area to observe the sale and to also protect the witness (68a, 69a). Later the witness transferred the heroin inventory to Club

Espana at 14th Street (70a, 71a). He also met the appellant and the two other police officers at the Cafe Madrid on 14th Street and asked them to guard him when he made the transfer of the inventory and disposed of the narcotics (71a-73a). This first sale was made to a co-defendant who was on trial named Demetrios Papadakis. Papadakis was accompanied by still another co-defendant named Elissa Possas (73a, 74a). After receiving the cash proceeds of the sale this witness met the appellant and the two other police officers at the Hotel Taft where the purchase price of $12,000 was divided between the four of them (74a-76a).

A few days later, Ramos called this witness about another sale. His brother-in-law, Aguiluz, told the witness that he would observe the sale so as to guard the witness from any possible danger (77a). The witness told the jury that he secreted the narcotics to be sold in a subway locker and then went to the Cafe Madrid to meet Papadakis. Papadakis was short of funds and the witness reported this to the appellant and the other two police officers (78a). Ultimately, the transfer was made (78a, 79a). The witness took the proceeds to an east side apartment in Manhattan (79a). Ramos later complained and so did the buyer about

the quality of the narcotics (80a).

Still later, this witness arranged a sale to the co-defendant Nieves (80a, 83a). This sale involved $24,000 as a price (84a, 85a). Again this witness met his brother-in-law, Daly and the appellant where the money was divided between the four of them (85a).

In regard to the government's proof of the disposal of the cocaine, this witness testified that Ramos introduced him to a man named Lorenzo (86a). At this phase, the other parties including the appellant were on vacation. The witness was instructed that he was not to transfer any narcotics while they were away (86a, 87a). Disobeying these instructions, this witness gave half a kilo of cocaine to Ramos who transferred it to Lorenzo and received $4,500 (86a, 87a). Again this witness made another transfer to this purchaser but by mistake he transferred one kilo instead of half a kilo. This left him with a balance in the inventory of one-half a kilo of cocaine (86a, 87a). Ultimately, this one-half kilo of cocaine was given to Lorenzo thus exhausting the inventory (87a, 88a). Lorenzo paid the price in installments leaving a small balance unpaid (88a, 89a). When the other police officers returned from vacation this witness told

his brother-in-law about this sale and Aguiluz expressed annoyance (89a). Ultimately the proceeds of this sale was divided between the four parties (90a, 91a).

This witness pled guilty to the narcotics conspiracy alleged in the indictment (92a, 93a).

Carl Aguiluz, the brother-in-law of the previous witness Boutureira, initially testified as to his enlistment in the police force of New York City and his ultimate assignment to narcotics investigation. In investigating narcotic violations, this witness worked with the appellant and Daly who also were police officers (104a, 105a).

He, Aguiluz, was with the appellant and Daly on April 14, 1970 in the evening and were in the vicinity of 14th Street and 7th Avenue. They were in two automobiles. They had another car under observation which contained four (4) occupants, one of whom was a woman. This car aroused their curiosity and they observed that it had a Florida license plate. Their suspicions were aroused because of the behavior of the occupants of that car (107a-110a). Thus, the car made stops at various eating places (109a, 110a). The appellant and Daly on one occasion followed the occupants of the car into a delicatessen. There the appellant overheard a conversation between the occupants where one of them

stated in substance that the others should not buy any bread because they had bread in the apartment (109a, 110a).

At any rate, when the occupants of the suspect car resumed driving, they were followed by this witness and the appellant and Daly to Fort Lee, New Jersey (111a). At Fort Lee, New Jersey this witness and the others stopped the followed car (110a, 111a). Apparently this caused some disturbance because the local police arrived and after this witness explained to the local police what they were doing, the local police suggested that they go to a parking lot of a motel (111a, 112a). At the motel one of the occupants of the car had what appeared to be false passports from various South American countries. Ultimately this witness and the other two defendants took the occupants to a New York City police precincet (111a, 112a).

According to this witness the pretext for arresting the occupants of that car was the falsity of the passports. But the witness was in doubt as to whether that constituted a crime. Daly however told this witness,winking at him, that there was a gun in the followed car. Apparently this was the cause of the arrest of the occupants of the car and their removal to the 6th Precinct in New York City (114a).

At the precinct one of the arrestees named Gonzalez accused Aguiluz of stealing a sum of money from him. Aguiluz asked Gonzalez to look at his possesssions seized from him and show where the money was supposed to have been. What was seized from Gonzalez were papers. Gonzalez inspected the papers and he attempted to swallow one of them causing a scuffle (116a, 117a). Aguiluz and Daly through a perusal of the papers ascertained the location of a certain apartment in New York City which the arrestees occupied (117a, 119a).

Having thus learned of this apartment Daly and Aguiluz proceeded and entered the apartment and found nothing. However they also saw two securely locked closets. One of them called the appellant and directed him to call a police expert who could open doors. This police expert was one John Kidd who was an expert in picking locks. The latter appeared and successfully opened the closet doors (119a-122a). The closets contained over a hundred kilos of narcotics consisting of heroin and cocaine. These were seized, (123a-125a). Later the appellant having received a call from one of these police officers arrived at the apartment (127a).

While placing their discovery in suitcases, Daly told the witness he wanted to keep five packages for the purpose of "flaking" ("flaking" appears to be the argot for planting narcotics on a person by the police so that an arrest can be made (125a). Aguiluz readily agreed to this (125a, 126a). Thereupon Aguiluz called the appellant at the precinct, told him of the arrest and the appellant told him he would go to the apartment (127a). When the appellant arrived this witness told the appellant about the removal of five (5) packages of the narcotics (128a). The appellant allegedly replied "fine", (129a).

Ultimately, they all left the apartment and Aguiluz went to the District Attorney's office to get a search warrant to search the apartment (129a-130a).

Ultimately, it appeared that $1200 was taken from these arrestees. Aguiluz discussed with the appellant the division of this money and the appellant told him that the fourth police officer, Stefania, wanted to share it. At any rate the money was divided with Stefania included (133a, 134A). This occurred April 15, 1970 (134a, 135a).

It next developed that an employee of the federal government named Seely came to the precinct (134a, 135a). He was

in charge of the drug section of the United States Customs (135a).

After these transactions were over, Aguiluz got the valise containing the five (5) kilos of narcotics from Daly (135a, 136a).

During the course of the direct examination of Aguiluz, he testified that at the Club Espana he was talking about the retention of the five (5) kilos of narcotics. It appeared that the appellant told this witness or asked him, that perhaps the five (5) kilos should be thrown in the river (137a). Daly did not approve of that suggestion (137a). Ultimately Daly replied that the narcotics should be sold and this witness stated they would have to find an outlet to dispose of the narcotics by sale (137a, 138a). The witness suggested his brother-in-law and the appellant and Daly agreed (138a).

Aguiluz also told the jury that while illegally wiretapping, he heard his brother-in-law discussing a narcotic transaction over the telephone (150a, 151a). When the appellant learned of this he became upset (152a, 153a). Aguiluz confronted his brother-in-law and warned him (153a).

Aguiluz then told of the meetings with Boutureira and the others to divide the money. All told between $53,000 and $56,000 was divided (155a, 156a, 157a).

The witness attributed to the appellant the conversation whereby the appellant told him that he went to the apartment of the female that was arrested on April 15, 1970 and found $5,000. This was divided by the appellant with the other police officers (157a-159a).

Continuing his testimony, Aguiluz related that between March and April 1970 he spoke to the appellant and Daly about another detective named Lamatina. This related to an arrest of persons named Diaz and Leguizamon (159a).

That arrest occurred March 31, 1970 (161a). That arrest involved an attorney for those persons arrested who wanted to know whether he could put a "fix" in (161a).

Between March and April 14, 1970, this witness met the other police officer Lamantina who told him that he was an intermediary for an attorney named Santangelo and one DeStefano (163a, 164a). It later appeared that DeStefano was a bail bondsman (218a). According to this witness the appellant said that $25,000 would be sufficient (164a). After April 14, 1970

the appellant told him that he turned over the papers recovered from Diaz and Leguizamon to Lamantina (165a). Within two months after April 14, 1970 he met Lamantina with the appellant and Daly (165a). This time, according to the witness the appellant asked for $150,000 to influence the case (165a). The appellant appeared discontented because the attorney would not pay for past favors (166a). There was a later meeting where Lamantina turned over $5,000 to the appellant. This apparently was from the attorney for the past favors (167a). This money was divided with the other police officers (168a).

The appellant testified to a prior transaction on October 22, 1969. This witness arrested two persons named Mendez and Castillo (169a). $11,000 was received and it was divided with the appellant and other police officers (170a).

On March 31, 1970, Leguizamon and Diaz were arrested (170a). $40,000 was seized which was kept by the appellant, another police officer named Eagan, the bondsman DeStefano and others (171a).

The witness testified as to unrelated crimes occurring in May 1970 where Daly seized $210,000 from the person

arrested who was named Bandeira (171a). This was allegedly divided between the appellant and the others (172a). There was an arrest upon a person named Lopez where $40,000 was seized and the money divided by the appellant and others (172a).

In September 1970 a party by the name of Olate was arrested and $7,000 was divided (173a, 174a).

Finally this witness recounted that a person named DeValle was arrested and $17,000 seized from him of which $8,700 was vouchered with the police department and the balance retained (174a, 175a). This occurred in September 1969 (175a).

Next, a police officer named Nicholas Lamattina testified. He gave his background with the police department (200a, 201a).

Lamattina related that he met the attorney Santangelo (204a). This attorney represented one of the defendants on the "100 kilo case" (that's the arrest of April 15, 1970) and wanted to know whether anything could be done to help his client (205a). This witness later met Daly, the appellant and Aguiluz to discuss this matter (205a). One of those

persons wanted the attorney to show good faith because he owed them $5,000 for past favors (206a, 207a). One of those persons wanted the money put up first (207a). When the witness spoke to Santangelo he acknowledged his past indebtedness (208a). Later Santangelo gave this witness money which he gave to the other police officers (209a, 211a). The witness spoke to the appellant, Daly and Aguiluz about the arrest of April 15, 1970 (211a). One of them stated that the price would be $125,000 (212a). Santangelo also told this witness that he had witnesses abo[illegible] the illegal arrest of those persons in New Jersey; the witness told this to the appellant who said that there was no "problem" (217a).

Before April 15, 1970 this witness met the appellant several times. He testified about prior corrupt acts during this period of time before April 15, 1970 (218a). Thus this witness testified about another case involving a lawyer, the Rosner case and about the bondsman DeStefano (218a).

James Sottile, another police officer testified that he knew the appellant and Aguiluz (248a).

On October 22, 1969 he arrested a person named Mendez in Brooklyn for narcotics. The appellant was with him (249a, 250a). In connection with that arrest, $6,000 to

$9,000 was seized by another police officer named Fox (250a). This money was divided between the appellant and the other police officers (251a). On September 11, 1970 he arrested two persons named Olace and Quintanella (251a). The appellant was not with him at the time of the arrest but arrived later. Money seized from the arrestees was divided (252a).

Then the witness was allowed to testify that on prior occasions he divided money with the appellant (253a).

Another police officer by the name of Stefania testified (265a). On March 31, 1970 he received a call from the appellant (266a). He was informed that the appellant and Daly were observing some South Americans who were believed to be involved in narcotic trafficking. These suspects were at the Hotel Taft. The appellant asked them to meet him there (267a). He described his entry into the Hotel Taft (267a, 268a). The appellant told him that Aguiluz called and told him that he was in the hotel room with the suspects, that the suspects were on their way down to the lobby and that they should be arrested. That Aguiluz found narcotics in the room (268a, 269a). The witness called another police officer named Eagan and told him to meet them at the hotel. The suspects were

arrested and taken to the lobby, (269a, 270a). This witness described the narcotics as being in a suitcase possessed by Daly (269a,270a).

Later Eagan and another police officer named Wooster arrived at the hotel. The witness told Eagan that the appellant and Aguiluz informed him that there was a large amount of money in the hotel room and that it could be taken without vouchering all of it (270a, 271a). The witness and Eagan with the appellant and Aguiluz proceeded to the room. After the appellant and Aguiluz spoke to an occupant the appellant came out of the room with a black travelling bag saying it contained money (271a, 272a). The appellant suggested later that they go to the Holiday Inn Motel at 57th Street and divide the money (272a, 273a). Eventually the appellant, the witness and Eagan went to the motel and the money was divided. The amount was about $40,000 and it was split five ways (273a, 274a).

On April 15, 1970 this witness received a call from the appellant (274a, 275a). The appellant told him about the investigation and asked him to come to the apartment on West 19th Street. Arriving there this witness saw the appellant, other police officers and knew that Eagan was already notified (275a). He described what he saw in the

room as consisting of piles of several packages containing either heroin or cocaine. He estimated the aggregate weight of the contents of the packages as about 100 kilos (275a).

On May 11, 1970 he also received a call this time from Daly. Daly told him that he was on an investigation with the appellant and Aguiluz and that they observed South American drug dealers at the John F. Kennedy Airport (278a). Daly ascertained that these suspects left their hotel without paying the bill and planned to utilize that unpayment as a pretext for arrest (278a). When the witness got to the airport he saw Daly,with a black pouch,who told him it contained a large amount of uncounted money (278a). This witness never found out how much money was there but one of the police officers stated that $2,900 would be vouchered and the rest would be divided with the others (279a). The appellant at the police precinct handed this witness a number of bills telling him it was his share (280a). The amount was $10,000 or $12,000 (280a).

Albert Seely, a U.S. Customs Agent, testified that in December 1969 he commenced investigating narcotic imports by South Americans. This investigation was known as the "South American smuggling group" (286a). Seely learned

from the news media that four South Americans were arrested by New York City police at the McAlpin Hotel on December 7, 1969. He went to 100 Centre Street, the courthouse, where the four arrestees were to be arraigned (287a, 288a). He spoke to two New York City police officers and learned that one of the arrestees named Lopez arrived at the John F. Kennedy Airport with narcotics concealed in two wine jugs (288a).

On December 8, 1969 two U.S. agents covered flights at that airport from South America. They ultimately arrested a courier named Arenia Arraya Murchio (288a). He was represented by the attorney named Santangelo. The government's theory as to the introduction of this evidence was that Santangelo was named by the grand jury as a co-conspirator (290a, 291a). Merchio ultimately pled guilty in the U.S. District Court, Eastern District of New York, and was represented by Santangelo (291a).

On April 16, 1970, through the news media this witness learned of the April 15, 1970 arrest and commenced an investigation to learn the identity of the suspects (292a, 293a). The names of those persons arrested were Emilio Diaz Gonzalez alias Alfredo Picada, Elena Deriso, Elias

Yolanda Sariemento, Jorge Aparicio, Jorge Rodriguez Arraya, alias Juan Redondo (293a). The witness received passports relating to these persons. One of the passports was in the name of Waldo Diaz. Six months later he learned that the arrest was connected with the December 1969 arrest previously described. It seemed that Arsenia Arraya Murchio one of the arrestees was connected with the same"organization" involved in the earlier arrest (293a, 294a). Santangelo represented some of the defendants (295a).

The witness testifed that Diaz and Deriso fraudulently entered the United States, thereby violating the immigration laws (295a). The witness notified other federal authorities of this (295a, 296a). Aguiluz gave him the information as to these suspects (296a).

In April or May 1970 this witness went to New York City and conferred with an Assistant District Attorney of New York County. The witness' purpose was his concern that the suspects would get out on bail (297a). During this conference the appellant and Aguiluz were present (297a).

On May 15, 1970 he received a warrant from Miami for the arrest of Diaz and Deriso. He found the warrant with the appropriate authority as to Diaz but couldn't file a

warrant as to Deriso because he already was out on $100,000 bail (298a). Ultimately federal charges were filed against Diaz. Seely also conferred with the District Attorney and a United States Attorney named Tendy as well as Diaz and his lawyer Santangelo (299a, 300a). Diaz's attorney Santangelo complained of the New Jersey arrest. Consequently the witness, Santangelo and Diaz went to New Jersey to procure witnesses as to the New Jersey arrest and investigate the circumstances (300a -302a).

On May 28, 1970 this witness executed an arrest warrant against Jorge Rodriguez for an illegal entry into the United States (303a). However, Rodriguez agreed to cooperate with the federal authorities (303a).

On January 7, 1971 in the United States District Court, Eastern District of New York, indictments for narcotic violations were had. These indictments involved the occurrences of the smuggling of heroin in wine jugs previously described (303a). The names of the defendants were Emilio Diaz Gonzalez, Elena Deriso Sariemento, Waldo Diaz, Pedro Rivera, and another unnamed defendant (303a, 304a).

In June 1970 there was a joint investigation between the Federal Bureau of Dangerous Drugs and the Customs Bureau.

This was called the "Condor Operation" (304a, 305a).

Concluding his testimony Seely told the jury that Elena Deriso employed Arraya as a cook (306a). Arraya was arrested December 8, 1970 and cooperated with the government (306a, 307a). Arraya delivered narcotics to Deriso which be brought from South America (308a). Seely however did not know of the seizure of money from her apartment in Brooklyn nor that the police kept $1,200 from the April 15th arrest and also kept 5 kilos of narcotics seized in connection with that arrest (309a, 310a).

Michael Yarchak employed as a chemist with the New York City Police Department testified that his duties consisted of analyzing substances to ascertain whether they had narcotic contents (311a). In December 1972 he attempted to conduct a re-analysis of narcotics which were in the New York City police property clerk's office (311a, 312a). This involved the 100 kilos of narcotics seized April 15, 1970 (312a). His analysis showed that there was no narcotics present (312a). All that the plastic bags which he examined contained was a white powder (312a). The witness explained that he believed that a certain amount of the material may have been removed from the police custody and that the authorities

wanted to have that particular case reanalyzed to determine if the original heroin and cocaine were present (314a).

THE DEFENSE:

Coral Novoa, the wife of the appellant, testified that she was married to the appellant, there were two children of the marriage (320a). She knew Carl Aguiluz (320a). Aguiluz lent the appellant $1,000 (321a). It appeared that the appellant needed this money to make repairs to his house (321a). There came a time when she heard about the appellant's arrest (321a, 322a). After the appellant's arrest Aguiluz telephoned her on March 11th and asked whether the appellant was at home (328a). Since the appellant was not at home, Aguiluz told her to tell him to call him at the office of "Mr. Puccio" (it is believed that Mr. Puccio was a United States Attorney) (328a). Later Aguiluz called her again and being told that the appellant was not at home asked the appellant's wife that for her sake and the sake of her children the appellant should call him at Mr. Puccio's office (329a). After a third call from Aguiluz this witness told him that the appellant did not want to talk to him because Aguiluz lied about the appellant (329a). She also asked Aguiluz how he could go to her father's wake solely for the purpose of getting a repayment of the $1,000 loan previously made to the appellant (329a).

The appellant also testified in his own behalf. However, before referring to this this Court's attention is respectfully drawn to the fact that the appellant was under a Court restraint not to testify to the fact that he previously arrested a co-defendant in this case named Nieves for a narcotic violation and that Nieves as a result was convicted (588a-592a). It appears that during the course of the government's case a memorandum book kept by the defendant when he was attached to the New York City Police Department, was at the request of the defendant's counsel, given to him by the prosecutor (67a). The Court was requested by an attorney for the other defendants in the case to restrain the appellant's attorney from cross examining any government witness about that portion of the book that would relate to the arrest of a co-defendant. This request was granted by the Court (100a).

The appellant's direct cross examination, in other words, all his testimony are found on pages 330a-518a).

The appellant in his testimony gave his background and described his service as a New York City police officer (333a-351a). This witness also described the arrest at the Hotel Taft and his participation in it. He denied taking any money or participating in any wrong-doing (363a-364a). Furthermore, the arrestee in that case through his efforts, was indicted in the State Court and pled guilty (370a, 371a).

In regard to the events of April 15, 1970, he described the events leading to that arrest (372a-386a).

Then the appellant testified that he never agreed to betray his duties as a police officer and that he never accepted any money from Lamantina (403a, 404a).

He was told by Santangelo, the attorney for one of the arrestees previously described, that Seely, the previous witness who was with the Customs Bureau, was prejudiced against him (412a).

The appellant related that he testified before governmental bodies investigating corruption and crime and was commended (417a, 418a).

The appellant denied trafficking in narcotics, denied stealing money, denied aiding and abetting offenders and related that he never agreed to ask for $100,000 to "fix" a case (418a-421a, 429a-434a).

Furthermore, Aguiluz, a main witness for the government, did lend him money so that he could make repairs to the house and when he was not repaid, harrassed him. Ultimately, the appellant repaid him (428a).

POINT I:

THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS FUNDAMENTALLY PREJUDICED BY THE COURT ALLOWING IN EVIDENCE TESTIMONY OF SIMILAR ACTS, OCCURRENCES OR CRIMES UNCHARGED IN THE INDICTMENT.

The 5th Amendment to the Federal Constitution provides that no person can be held for an infamous crime or a felony unless a grand jury indicts him. Yet as a matter of proof, it is a rule of evidence that the prosecution can introduce similar acts constituting crimes, so as to prove motive, intent, identity or common plan or scheme.

The indictment herein charged two counts of conspiracy. The first count was based on the general conspiracy statute Section 371 of 18 U.S.C.; the 4th count charged a conspiracy based on the then relevant Federal Narcotic Statutes. The other uncharged acts and occurrences were shown to have occurred prior to the indictment dates and also during the dates involved (69a, 175a, 218a, 287a, 288a, 291a). However both the 1st and 4th counts charging conspiracy were co-extensive in time. Thus the commencement of both conspiracies was pegged on or about April 14, 1970; the date of the last overt act in counts 1 and 4 were the same also, namely, the summer of 1970. It is submitted that the date of the last overt act is the termination of the conspiracy as was held

in Fiswick v. United States, 329 U.S. 211 at page 217.

It is submitted that the lurid acts involved in the prior and similar occurrences involving police corruption in regard to narcotic trafficking, deprived the appellant of a fair trial which adversely affected the appellant's case and a fair jury appraisal of the facts as to each and every count that the appellant was convicted of.

The defense here was that the appellant did not engage in the corrupt activities that the government's witnesses did. There is no claim by the appellant that he did not intend to commit the acts or that he was mis-identified or he may have committed an act, but did so out of ignorance there being no subjective culpability. Furthermore, since the indictment contained two conspiracy counts, it would seem that there was sufficient background for the government to prove its case if it could, without the showing of evidence that showed that the appellant had a bad character.

As this Court held in U.S. v. Klein, 340 F. 2d 547, 549 (Cir. 2d 1965), where there is a claim by the appellant that the acts charged were innocently performed and the appellant interposed an issue of lack of intent, the government can on a"limited basis" introduce similar crimes to

show that the appellant was not an "innocent bystander".

Furthermore, because there were two connected conspiracy counts in the indictment involving common facts, there was no need to introduce extraneous acts and crimes that the grand jury did not indict the appellant for. See U.S. v. Goodwin, 402 F. 2d 1141 (Cir. 5th, 1974) at page 1150. That holding recognized that while the exceptions to the general rule about not admitting uncharged crimes into evidence, cannot be mechanically applied but that a Court has to take a realistic and balanced approach to the issue. Balancing on one hand the impact on the jury as to the appellant's character, and the limited use of the evidence under the exceptions. It was further stated that if there is other evidence in the case to achieve the goal the prosecution seeks, recourse to this rule should not be had. It was further held in that case in regard to the exception involving a common plan or scheme, that:

> "...as an exception to the general rule against admitting other crimes evidence courts have permitted the introduction of such evidence to show a design or scheme on the part of the accused to commit the specific crime with which he is charged, but never to show a design or scheme to commit 'crimes of the sort with which he is charged'..."

In other words, in this case, since the indictment contained two conspiracy counts that may have violated different federal statutes, nevertheless such conspiracy counts were interrelated by the facts and occurrences. The introduction of the uncharged crimes at most would impress the jury that the appellant was engaging in the practice of conspiring with other people and that therefore such practice became an evidentiary basis for the indicted conspiracies.

Moreover, it would seem that any similar uncharged occurrences or crimes would not necessarily constitute a common scheme or plan. In People v. Fiore, Court of Appeals of the State of New York, 1974, 34 N.Y. 2d 81, a school official was tried and convicted for bribe receiving, that is receiving kick-backs. At the trial the prosecution was permitted to introduce evidence of previous uncharged corrupt practices by the defendant. In reversing the conviction, the New York State Court of Appeals recognized that the evidence of prior crimes while probative, may be outweighted by the prejudicial effect on a jury. Therefore it was held that before such evidence may be admitted the Court had to distinguish between a common plan or scheme and the manner in which the accused committed the uncharged acts. Thus a common plan or scheme must involve a concurrence of common

features, so that the individual acts can be explained only by taking recourse to a common plan or scheme and that there be to establish a common plan or scheme an identity of time, circumstances, place or places involved.

In this case, the government's witnesses merely showed that, where possible, money was taken by suspects after they were arrested. No conceptualization of a common plan or scheme was necessary to explain that, where possible, police officers would take money from the suspects instead of turning it in to the proper authorities. This doesn't involve a common plan or scheme.

As was held in Walker v. United States, 104 F. 2d, 465 (Cir. 4th, 1939), isolated and remote acts unconnected with the charged conspiracy or scheme are not admissible as evidence of prior or similar crimes (104 F. 2d 465 at page 470).

Furthermore, in this case the appellant testified; see U.S. v. Frank, 494 F. 2d 145, (Cir. 2d, 1974). So that there was more before the jury in this case than the government's evidence. The prejudicial effect of the government's introduction of other crimes may have deafened the jury to the appellant's testimony so that the jury convicted the appellant because of an adverse impression it got from the uncharged

crimes, rather than the credibility of the government's witnesses as compared to the appellant's testimony and his appearance on the stand.

See Proposed Rules of Evidence for United States Courts, Rules 403 and Rule 404(6).

Furthermore, at the very least the trial court should have instructed the jury that proof of other crimes is limited to the exceptions embodied in that rule and that such proof is not to be considered as proof of the appellant's bad character. No such limiting instruction was given in this case. Thus this Court in U. S. v. Klein, supra, 340 F. 2d, 547, 549 held that the evidence offered must be on a limited basis and that the jury must be relied upon not to have convicted a defendant because of his bad character.

See also People v. Fiore, supra.

Thus, if the theory underlying this type of evidence is that it is admissible only for a limited purpose, it would seem to be plain error to omit an immediate cautioning instruction to the jury by the Court, see U.S. v. McClain, (C.A.D.C. 1971), 440 F. 2d 241.

Furthermore, the appellant was not allowed to either cross examine the government's witnesses or to testify that he arrested Nieves on a narcotics charge. Nieves was a

co-defendant who was acquitted by the jury. This theory underlying this type of proof was that it was abut that the overall effect of showing prior occurrences or even the occurrences involved in the counts so as to impress the jury that the appellant was a corrupt public servant. Such proof or explanation, would serve rather to show that the appellant had a "common plan or scheme" that when he arrested a suspect, and seized money,the money would be vouchered in or that the arrest would be properly handed and that the defendant was not corrupt. In the context of this case, the objectivity of this evidence was manifest that such evidence was highly probative, material and relevant. It would seem that the appellant's customs in arresting narcotic offenders would also come under the rule of evidence allowing evidence of customary practices of a business organization if regular and uniform; see U.S. v. Oddo, 314 F. 2d 115 (Cir. 2d 1963), Cert. Denied, 375 U.S. 833.

POINT II:

THE FIRST COUNT CHARGING A CONSPIRACY UNDER 18 U.S.C. 371 WAS UNSUPPORTED BY THE EVIDENCE THAT THE APPELLANT HAD THE REQUISITE INTENT TO VIOLATE THE FEDERAL STATUTES DESIGNATED THEREIN SECTIONS 3 and 1510 OF 18 U.S.C.

The first count of the indictment while framed under the general conspiracy statute 18 U.S.C. 371, and also in the first paragraph thereof charging the appellant with a conspiracy to defraud the United States by obstructing federal agencies in investigating and prosecuting narcotic violations, and further alleged "to violate Sections 173 and 174..."

It is submitted that these two counts were multiplicitous because in effect there was one conspiracy notwithstanding that the "agreement" may have had more than one purpose. As was stated in U.S. v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952), what was involved here was a "course of conduct" at page 224, rather than two separate agreements. In Braverman v. U.S., 317 U.S. 49 (1942), it was recognized that it is not duplicitous where one overall conspiracy is charged despite the fact that the corrupt agreement contemplates the violation of more than one penal statute. Thus, the 5th and 6th overt acts under the first count allege the taking of the narcotics involved in the other counts on April 15, 1970; the 9th overt act under the first count charges the agreement to transfer

the seized and retained narcotics; the 10th and 11th overt acts allege the meeting with the ultimate recipients of the narcotics for further distribution. In the 4th count of the indictment, charging a conspiracy under the Special Narcotic statutes, the overt acts are practically the same as are involved in the first count, charging the general conspiracy. See Braverman v. U.S., 317 U.S., at pages 54 and 55 holding that an analysis of the overt acts is not essential to a determination as to whether there is one overall conspiracy having multiple objectives and yet remaining one conspiracy.

With two conspiracy counts given to the jury there was a resulting prejudice, consisting of an adverse psychological effect on the jury which adversely affected an objective appraisal of the evidence; see Rule 8 of the Federal Rules of Criminal Procedure and U.S. v. Ketchum, 320 F. 2d 3, at page 8 (Cir. 2d-1963).

In Ingram v. United States, 380 U.S. 672 (1959), it was held that certain of the petitioners were convicted along with others for a conspiracy to violate the Federal Revenue Laws governing the taxation of gamblers. The convictions of certain petitioners were set aside it being held that it was not established that those persons were connected with an illegal gambling enterprise and conspired to violate the Federal Tax

Laws the Court holding on pages 677-678 that:

> "It is fundamental that a conviction for conspiracy under 18 U.S.C. Section 371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States'..."

In this case, there is no showing that the appellant knew that the federal jurisdiction was involved, or that the federal jurisidiction was being exercised for the authorities.

In U.S. v. Crimmins, 123 F. 2d 271 (Cir. 2d, 1941), this Court held that a conspiracy to transport stolen securities with interstate commerce was not established unless the accused was shown to have understood the criminal venture i.e. to central aspects relative to the elements of the substantive crime. Thus, it had to be shown to prove conspiracy there, the interstate nature of the theft and the knowledge of that interstate nature. See U.S. v. Gallishaw, 428 F. 2d 760 (Cir. 2d 1970). Recently this concept has been adhered to in U.S. v. Rizzo, 491 F. 2d 1235, (1974); U.S. v. Cangiano, 491 F. 2d, 906 (Cir. 2d 1974); U.S. v. DeMarco, 488 F. 2d 828 (Cir. 2d 1973); U.S. v. Alsondo, 487 F. 2d 1339 (Cir. 2d 1973), cert. granted under the name of U.S. v. Feola, 42 U.S.L.W. 3584 (April 15, 1974).

Furthermore, the substantive counts, the violation of which was allegedly the purpose of the conspiracy count under

Section 371, were never given to the jury for their consideration.

It is further submitted that there could not be a conspiracy to violate 18 U.S.C. 1510 under the ruling of U.S. v. Williams, et al., (Cir. 8th, 1973), 470 F. 2d 1339, as to the appellant Walker. That case analyzed 18 U.S.C. 1510. It was held in that case that after analyzing Section 1510 and its legislative history, Section 1510 is not violated if an accused does not know that a federal investigator is involved in the investigation which is sought to be insulated from a defendant's interference under Section 1510, at page 1342. In this case, there was no proof whatsoever that the appellant knew of any impending federal investigation or intended to impede a federal investigation.

It is doubtful that the appellant could have been convicted for the substantive act defined in Section 1510. If that is so, he could not be convicted of a conspiracy to violate the same, because the same amount of proof would be required to sustain the conspiracy conviction under the first count. See U.S. v. Bufalino, 285 F. 2d 408, at pages 416, and 418.

Since the second paragraph of the first count of the indictment alleged that the appellant and others seized $1200 and agreed to keep it without reporting the seizure to the federal authorities, it would seem that the appellant's 5th

Amendment privilege or right against self-incrimination was involved. Failure to report to the federal authority would involve a disclosure that would inculpate the appellant insofar as both the state and the federal sovereigns were concerned. There was no such duty under the rulings of Marchetti v. U.S., 390 U.S. 39 (1968).

Finally, it is submitted, that there could not be a conspiracy as alleged in the first count under Section 371 to violate 18 U.S.C. 3. Section 3 defines an accessory after the fact. Since more than one party is involved in a violation of Section 3, it would seem that a conspiracy cannot possibly lie as a separate agreement under Section 371. It is the agreement which is the important element of the general conspiracy and the crime defined under Section 3. See U.S. v. Katz, 271 U. S. 354; Gebardi v. U.S., 287 U.S. 112.

POINT III:

THERE WAS NO PROOF THAT THE APPELLANT KNEW THAT THE COCAINE INVOLVED IN COUNTS 5, 9 AND 10 OF THE INDICTMENT WAS ILLEGALLY IMPORTED.

The Court charged the jury that they may rely on the statutory presumption provided for in the predicate narcotic statutes underlying the indictment. However, there was also proof that on April 15, 1970 when the narcotics were discovered, certain of the narcotics were wrapped in South American newspapers. During the jury's deliberations and when they returned to pose certain questions to the Court, the Court stated that the inference of illegal importation could be drawn from possession. Then the Court stated that additionally the government relied on evidence of illegal importation because the narcotics were wrapped in South American newspapers and also from three passports of South American countries found on the offenders who were arrested April 15, 1970. The Court restricted this evidence as to the appellant and not to the other co-defendants (647a). In Turner v. U.S., 396 U.S. 398, the Supreme Court of the United States held that the presumption of illegal importation does not attach to cocaine where it is not of a large quantity, the Court not giving any further consideration to what a large quantity was or was not. However, it is submitted that it was error to charge the jury that the

fact that the narcotics (it is not known whether the cocaine or the heroin was wrapped in Spanish newspapers) was wrapped in Spanish newspapers, that that could support an inference that the cocaine was imported. The cocaine could have been wrapped in South American newspapers purchased in New York City. Since there was a general jury verdict, it is not known whether the jury relied on the inference provided for in the statute or based its finding on the fact that the Court told the jury that the narcotics wrapped in South American newspapers, would support an inference of importation.

Additionally, while the Supreme Court of the United States dealt with the lack of factual support for a presumption of importation in regard to cocaine because the possessor may have gotten it from a thief, it is to be noted in this case, that 100 kilos of all the narcotics seized in this case were actually missing from the police department after the 100 kilos were vouchered with the New York City Police Department.

Furthermore, while the Turner case struck down the inference of knowledge, it is respectfully submitted that the inference cannot withstand the test of due process, in the light of the recent holding of Barnes v. United States, 37 L. Ed. 2d 380 which held that the constitutional basis for an inference that may be entertained by the jury is that the factual basis

giving rise to such inference must be established beyond a reasonable doubt. In view of the fact that the Turner case questioned the inference of knowledge flowing from the possession of cocaine, but did not lay down the reasonable doubt test, it would seem that any ambiguities in the Turner case will resolve favorably for the accused in the holding of Barnes. In other words, the issue is:Can it be stated that the inference flowing from the possession of cocaine that it was so imported is supported by facts established beyond a reasonable doubt.

POINT IV:

THE APPELLANT'S RIGHT TO AN OBJECTIVE CONSIDERATION OF THE EVIDENCE BY THE JURY WAS PREJUDICED BY THE COURT GIVING A SUPPLEMENTAL "ALLEN" CHARGE.

In regard to counts 5 through 10, the jury reported a deadlock. The Court then rendered an "Allen" charge. In giving the charge, the Court among other things stated that time, effort and money of both the government and the appellant were involved. It is submitted that this was coercive. In U.S. v. Bailey, 468 F. 2d 652 (Cir. 5th, 1972), the use of the Allen charge was sustained more as a concession to precedent but the Court vehemently urged a rehearing en banc to re-consider the appropriateness of the charge. In U.S. v. DeStefano 476 F. 2d 324, 332-337 (Cir. 7th, 1973) it was held that in regard to an Allen charge, the American Bar Association recommended instructions to be utilized. See also U.S. v.

Bambulas, 471 F. 2d 501, 506 (Cir. 7th, 1972). It is to be noted that the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, do not include within the permissible scope of a charge to a deadlocked jury, telling the jury that money and expenses are involved.

Under the American Bar Association's standards, there is an elimination of instructions to the jury of the majority/minority issue and also no reference to the possibility of a retrial in the event of a hung jury.

In these days of high taxation and governmental expenses, this, it is submitted, had an extremely prejudicial effect upon the jury.

POINT V

THE APPELLANT'S PRE-TRIAL MOTION FOR A SEVERANCE OF THE CASE AGAINST HIM AS WELL AS THAT MOTION MADE DURING THE TRIAL, SHOULD HAVE BEEN GRANTED.

Rule 8 of the Federal Rules of Criminal Procedure has three types of permissive joinder. Two of them relate to joinder of offenses in one indictment and the third permits the joinder of defendants. However, it is provided in Rule 14 of the Federal Rules of Criminal Procedure, that if a joinder prejudices the defendant a severance or other relief should be granted.

As argued in Point I hereof, the appellant sought to show the jury that as a police officer he arrested a co-defendant Nieves who incidentally was acquitted. The theory of this was that the defendant was not corrupt, that his usage or custom as a police officer was to perform his duty, thus rebutting the corruption charged to the appellant.

This application for a severance was repeatedly made during the trial. The conflict arose because in a memorandum book kept by the appellant as a police officer, there was reference to an arrest of Nieves. Actually Nieves was convicted following that arrest for a narcotic violation.

It is respectfully submitted that the appellant was therefore denied a fair trial because of the joinder herein and the denial of the application for a severance.

CONCLUSION:

THE JUDGMENTS OF CONVICTION
SHOULD BE REVERSED.

Respectfully submitted,

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